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IN THE

Supreme Court of the United States

OCTOBER TERM 1978

No. 79-378

MAGAZINE PUBLISHERS ASSOCIATION, INC.
and
TIME INCORPORATED,
Petitioners,

v.

UNITED STATES POSTAL SERVICE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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The petitioners, Magazine Publishers Association, Inc. (MPA) and Time Incorporated (Time Inc.), respectfully pray that a writ of certiorari issue to review the judgment and opinions of the United States Court of Appeals for the District of Columbia Circuit entered on June 8, 1979 in the consolidated proceedings, *National Association of Greeting Card Publishers, et al. v. United States Postal Service*, No. 78-1448, *et al.*

OPINIONS BELOW

The opinions of the court of appeals (Per Curiam, Leventhal, J. and Tamm, J.), not yet reported, are set forth at Appendix A (App. A). The decisions of the Governors of the United States Postal Service dated

May 19, 1978 are set forth at Appendix B (App. B). Nine copies of the two-volume, unreported Opinion and Recommended Decision of the Postal Rate Commission dated May 12, 1978 have been lodged with the Clerk of the Court.

JURISDICTION

The judgment of the court of appeals was entered on June 8, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

(1) Whether in requiring the United States Postal Service and the Postal Rate Commission to apply the court of appeals' interpretation of the ratemaking provisions of the Postal Reorganization Act of 1970, the court failed to give due deference to the agencies' contemporaneous, consistent, and reasonable interpretation of those provisions.

(2) Whether the court below correctly interpreted the ratemaking provisions of the Act:

(a) as requiring the attribution of postal costs to the mail classes, to the maximum extent possible, on the basis of cost-of-service principles which the Postal Service and the Postal Rate Commission had determined were unreliable as a test of cost causality; and

(b) as further requiring the assignment of postal costs to the mail classes, to the maximum extent possible, on the basis of those principles, so as to leave only a small residuum of postal costs to be assigned on the basis of the noncost factors specified in 39 U.S.C. §3622(b).

STATUTORY PROVISIONS INVOLVED

Pertinent sections of the Postal Reorganization Act of 1970, 84 Stat. 719, *et seq.*, as amended, 39 U.S.C. §101, *et seq.*, are set forth at Appendix C (App. C). The section directly at issue in this case, 39 U.S.C. §3622, is also printed below:

§3622. Rates and fees

(a) From time to time the Postal Service shall request the Postal Rate Commission to submit a recommended decision on changes in a rate or rates of postage or in a fee or fees for postal services if the Postal Service determines that such changes would be in the public interest and in accordance with the policies of this title. The Postal Service may submit such suggestions for rate adjustments as it deems suitable.

(b) Upon receiving a request, the Commission shall make a recommended decision on the request for changes in rates or fees in each class of mail or type of service in accordance with the policies of this title and the following factors:

(1) the establishment and maintenance of a fair and equitable schedule;

(2) the value of the mail service actually provided each class or type of mail service to both the sender and the recipient, including, but not limited to the collection, mode of transportation, and priority of delivery;

(3) the requirement that each class of mail or type of mail service bear the direct and indirect postal costs attributable to that class or type plus that portion of all other costs of the Postal Service reasonably assignable to such class or type;

(4) the effect of rate increases upon the general public, business mail users, and enter-

prises in the private sector of the economy engaged in the delivery of mail matter other than letters;

(5) the available alternative means of sending and receiving letters and other mail matter at reasonable costs;

(6) the degree of preparation of mail for delivery into the postal system performed by the mailer and its effect upon reducing costs to the Postal Service;

(7) simplicity of structure for the entire schedule and simple, identifiable relationships between the rates or fees charged the various classes of mail for postal services;

(8) the educational, cultural, scientific, and informational value to the recipient of mail matter; and

(9) such other factors as the Commission deems appropriate.

STATEMENT OF THE CASE

This case involves (1) the correct interpretation of 39 U.S.C. §3622, the key ratemaking provision of the Postal Reorganization Act of 1970 and (2) the proper role of the courts in reviewing the decisions of the administrative agencies authorized to establish postal rates under that Act.

Prior to reorganization the postal system of the United States was operated by the Post Office Department (the Department). The Department for many years maintained a "Cost Ascertainment System," which was a "full cost" accounting system whereby all costs of the postal system were "allocated" to the various classes and subclasses of mail. The Congress itself, however, directly established postal rates.

A near national catastrophe, precipitated by the shutdown of the Chicago post office in October 1966, generated a movement for reform of the postal system. On April 8, 1967, President Johnson established the Commission on Postal Organization (the "Kappel Commission"). After extensive study the Kappel Commission in June 1968 published its report, *Towards Postal Excellence.* The report, highly critical of the existing postal organization and particularly the use of the Cost Ascertainment System in postal ratemaking, recommended drastic changes in postal organization and postal ratemaking.

Postal reform bills were introduced in Congress early in 1969 and again in 1970, followed by extensive hearings and floor debates. Differences between postal reform measures passed by the House and Senate were compromised in Conference and the Postal Reorganization Act was enacted on August 12, 1970. [1]

The Act created two new agencies, the United States Postal Service (Postal Service) and the Postal Rate Commission (PRC), and designated each an independent establishment of the executive branch of the Government. 39 U.S.C. §§201, 3601. Congress delegated its legislative authority to establish postal rates and fees to these new agencies and specified the procedures and substantive standards to govern the exercise of that authority. 39 U.S.C. §§3621, 3622, 3624,3625.

The Postal Service initiated the first rate proceeding under the new postal statute on February 1, 1971 by requesting the PRC to submit a recommended decision on a Postal Service proposal for increases in postal

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[1] The legislative history of the ratemaking provisions of the Act is discussed at pages 18-26 of this petition.

rates. PRC Docket R71-1. After extensive evidentiary hearings, briefing, and argument, the PRC issued its Opinion and Recommended Decision, which was approved by the Governors of the Postal Service on June 28, 1972, and ordered placed into effect pursuant to 39 U.S.C. §3625(b).

In its Docket R71-1 Decision, the PRC made some adjustments to the postal rates initially proposed by the Postal Service; both agencies, however, evidenced the same general understanding of the Congressional directive set forth in §3622(b). The Postal Service and the PRC determined that approximately half of postal system costs varied with the volume of mail and were "attributable costs" within the meaning of the first part of §3622(b)(3). All other costs were treated as a pool of "institutional" costs and were assigned, among the non-preferred classes of mail, on a judgmental basis in accordance with the noncost factors specified at §3622(b). Consistent with §3626(a)(1) none of these institutional costs was assigned to the preferred classes of mail.

On June 26, 1973, in appellate proceedings instituted pursuant to 39 U.S.C. §3628, the Court of Appeals for the District of Columbia Circuit affirmed the Governors' order. *Association of American Publishers Inc., et al. v. Governors of the United States Postal Service*, 485 F.2d 768 (1973). In a concurring opinion by Judge Bazelon, however, the court said that "[s]ection 3622(b)(3) is susceptible of a variety of interpretations" and suggested that, in future rate proceedings, the PRC should take a "hard look" not only at the manner in which the Postal Service assigned unattributable costs but also at the amount of costs designated as "unattributable." *Id.* at 779.

The next two postal rate proceedings, Dockets R74-1

and R76-1, culminated in opinions and recommended decisions by the PRC dated August 28, 1975 (R74-1) and June 30, 1976 (R76-1). These decisions contained refinements,[2] but made no basic change, in costing methodology and pricing principles. The PRC specifically rejected the use of accounting formulae for the "attribution" of fixed costs to the various classes of mail.[3] Referring to §3622(b) the Commission in R74-1 stated:

> The statute that Congress enacted requires us to distinguish between attributing costs on a causal basis and assigning the remaining mass of common costs which benefit all or a limited number of services. The key to this distinction lies in an analysis of cost behavior which will lead to a separation of the costs *caused* by the classes and services from all other costs. . . . Before we can distribute costs on that basis, however, we need to know which specific costs change in relation to changes in output or volume. It is by the consistent application of this principle that we can safely say that costs are "caused" by the classes and services. (PRC Opinion, Docket R74-1, Vol. 1, pp. 570-71.)

The Governors approved and adopted both PRC recommended decisions.

Petitions for review and appeals from the Governors' orders were again filed in the United States Court of Appeals for the District of Columbia Circuit. That court heard oral argument on the R74-1 appeals and issued its judgment thereon in a Per Curiam opinion dated

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[2] Refinements in methodology and different cost data led to increased attributions of postal costs—52.5% in R74-1 and 60% in R76-1.

[3] "Specific fixed costs" caused solely by service to a class of mail were attributed to that class.

December 28, 1976. *National Association of Greeting Card Publishers, et al. v. United States Postal Service*, 569 F.2d 570 (1976) (*NAGCP I*, reproduced at Appendix D). The appeals arising from the third postal rate case (R76-1) were eventually dismissed as moot.

In its Per Curiam opinion in *NAGCP I*, the court chose not to dismiss *that* case even though the R74-1 rates had been overtaken by new permanent rates.[4] Instead, the court of appeals proceeded to interpret §3622(b) as a "clear" and "express" statutory command of the Congress that cost-of-service principles (sometimes referred to by the court as "cost accounting principles")[5] must be applied to the fullest extent possible in both attributing and assigning postal costs for purposes of postal ratemaking. The court declared that the Postal Service and PRC had "flouted" that command. App. D40-41.

Although the court disclaimed an intent to prescribe a particular costing methodology or an acceptable percentage of attribution, it did, in fact, dictate a three-step methodology for postal ratemaking as follows:

> Subsection 3622(b)(3) provides, in short, that the Postal Rate Commission must first of all attribute to each mail class or postal service all postal costs which may reasonably be determined, through variability theory as well as through other reasonable inferences of causation, to be the consequence of providing the service. It must then distribute among the mail classes and services that significant portion of all remaining costs of the

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[4]The court found that "the instant controversy falls squarely within the 'capable of repetition, yet evading review' exception to mootness. . . ." App. D14-15, fn. 21.

[5]See App. D26,31.

Postal Service that may reasonably[74] be assigned to each on the basis of best available cost-of-service estimates. The residuum of costs is subject to discretionary allocation in accord with the noncost factors set forth in the Act.

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[74] We emphasize that "reasonably" as used in subsection 3622(b)(3) in connection with assignable costs must be read against the overall purpose of the section, which is to maximize the use of cost-of-service principles throughout postal ratemaking. Simply put it means that all reasonable efforts must be made to assign unattributed costs to the various classes of mail and service by use of acceptable cost-of-service estimates rather than to allocate them discretionarily as residual costs. (App. D40.)

In support of its construction of §3622(b) as compelling maximum use of "cost-of-service principles," the court relied heavily upon the word "requirement" which appears in subsection 3622(b)(3) and excerpts from the legislative history which, according to the court, indicated an aim of the Congress to "get politics out of the Post Office." App. D30-31, 36-37.

A different view of §3622(b) was taken by Judge MacKinnon, a member of the *NAGCP I* panel. In a concurring opinion, he said:

> A mere reading of this section indicates that Congress intended to vest a substantial discretion in the Commission to recommend rates and fees that are "fair and equitable," that relate to the value of the postal service provided to users, that consider competition, the effect upon the general public and business interests, the ease of handling certain mailable matter, the simplicity of the entire rate structure and such other factors as the Commission might deem appropriate. But if the Per Curiam opinion regarding section (b)(3) is to be construed as requiring that the attribution and assignment of practically all costs be on a strained

> cost-of-service basis, these discretionary factors may never have any substantial effect. How could the Commission recommend a rate for a particular class of mail that it found would be "fair and equitable" and would not adversely affect legitimate business interests if practically all the relevant costs were required to be attributed or assigned according to an almost absolute cost-of-service straight jacket? To make the seven discretionary standards meaningful Congress must have intended that there be some substantial volume of costs that are available for assignment. (App. D74.)

The Postal Service filed a Petition for Rehearing and Suggestion for Rehearing *En Banc*, contending, *inter alia*, that the interpretation of §3622(b) made by the majority of the *NAGCP I* panel was erroneous and "a radical revision of the statute rather than a reading of it."[6] The court denied the Petition for Rehearing; no party sought *certiorari*.[7]

The instant case commenced with the filing by the Postal Service on July 13, 1977 of its fourth proposal since reorganization to increase postal rates. PRC Docket R77-1. That proposal and the PRC's decision reflect the impact upon the agencies of the interpretation of §3622(b) imposed by the Per Curiam opinion in *NAGCP I*. Departing materially from their previous principles, the agencies not only used extended "inferences of causation" to maximize attributable costs but also adopted a new three-step methodology, in response to the directive of the court quoted above at pages 8-9.

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[6] Appellee's Petition for Rehearing and Suggestion for Rehearing *En Banc*, D.C. Cir. Nos. 75-1856 and 1857, at page 6.

[7] The decision in *NAGCP I* did not disturb then existing postal rates. This fact may explain why the Postal Service did not seek review of that decision by this Court. MPA and Time Inc. were not parties to the proceedings at *NAGCP I*, hence they had no standing to seek further review.

This new methodology treats *fixed* system delivery costs (termed "service related" costs) as "reasonably assignable" to first, second, and fourth class mail. The result is that postal costs attributed and assigned on the basis of "cost-of-service principles" have now risen to 74.54 percent of total postal costs (PRC, Vol. 1, p. 93), dramatically reducing the costs that may be judgmentally allocated on the basis of the noncost factors in §3622(b).

The Governors approved the PRC's decision on May 19, 1978. App. B. Review was sought by several parties including MPA and Time Inc. The court below heard all of these appeals in a consolidated proceeding entitled, *National Association of Greeting Card Publishers, et al. v. United States Postal Service,* No. 78-1448, *et al.* (*NAGCP III*). MPA and Time Inc. vigorously contended that the panel which decided *NAGCP I* had seriously misinterpreted 39 U.S.C. §3622(b). They also submitted a Suggestion for Hearing *En Banc,* which was denied.

On June 8, 1979, the court of appeals entered its judgment in this case, *NAGCP III.* The court summarily rejected the contention of MPA and Time Inc. that *NAGCP I* was wrongly decided, holding:

> If we were convinced NAGCP I was fatally flawed, our recourse would lie in a request for en banc consideration. We do not initiate that course. (App. A23, fn. 23.)

The court continued its overriding emphasis upon cost-of-service principles. See App. A14, 18-21, 30-32, 95. It affirmed the decisions of the PRC and Governors as "an acceptable first effort at meeting the strictures of *NAGCP I.*" App. A36. "[G]eneral satisfaction" with the cost allocation decisions made by the PRC responsive to *NAGCP I* was coupled with a

demand for "[f]urther improvements." App. A59.

REASONS FOR GRANTING A WRIT

Petitioners are requesting this Court to consider, for the first time, important questions concerning the meaning of the ratemaking provisions of the Postal Reorganization Act of 1970.[8]

I

The Decision Of The Court Below Has A Profound Effect On Postal Ratemaking And Poses New Questions Of Federal Law That This Court Should Settle.

The importance to the Nation of the postal system and of postal rates is reflected in the expression of postal policy appearing in the first paragraph of the first section of the Act of 1970, which states:

> **§101. Postal Policy**
>
> (a) The United States Postal Service shall be operated as a basic and fundamental service provided to the people by the Government of the United States, authorized by the Constitution, created by Act of Congress, and supported by the people. The Postal Service shall have as its basic function the obligation to provide postal services to bind the Nation together through the personal, educational, literary and business correspondence of the people. It shall provide prompt, reliable, and efficient services to patrons in all areas and shall render postal services to all communities. The cost of establishing and maintaining the Postal Service shall not be apportioned to impair the overall value of such service to the people.

[8] The only decision by this Court in a case arising under the Act is a memorandum decision remanding a case to the court of appeals "in light of . . . amended provisions of the Board of Governors' internal operating procedures." *United States Postal Service v. Associated Third Class Mail Users*, 434 U.S. 884 (1977).

To effectuate its policy concerning the apportionment of postal costs, Congress specifically mandated in §3622(b) the application of nine factors in postal ratemaking, seven of which are noncost factors. The opinions of the court of appeals, however, compel the postal agencies to apply cost accounting principles to the fullest extent possible in both the attribution and assignment of postal costs in derogation of the Act's noncost factors and the policy of not apportioning postal costs so as "to impair the overall value of such service to the people."

The cost and pricing principles used in setting postal rates determine not only the rates and fees paid by mail users (now yielding well over $15 billion in revenues) but also the level of appropriations for revenue foregone from free and preferred rate mail categories under §§3217, 3403-05 and 3626(a)(1) of the Act.[9] Rigid adherence to accounting cost-of-service principles that are unrelated to true cost causality precludes effective consideration of market demand factors in postal pricing. This will affect mail volume, mail revenues, and the employment of 660,000 postal workers. The pricing of mail services above mail user demand may cause significant declines in volume in those classes of mail (e.g., second and fourth) which are not subject to the postal monopoly.[10]

This Court should exercise its supervisory power to determine *now* whether the Court of Appeals for the

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[9]The total annual revenues for the Postal Service were determined by the PRC to be $17,586,375,000. The PRC found that those revenues would be recovered as follows: $15,565,329,000 from postage, rates and fees, $1,844,581,000 from appropriations and $176,465,000 from "other income." See PRC, Docket R77-1, Vol. 2, App. A and App. L.

[10]See 18 U.S.C. §§1693-1699, 1724 and 39 U.S.C. §§601-606.

District of Columbia Circuit has erroneously imposed its own interpretation of §3622(b) upon the federal agencies responsible for postal ratemaking. Although §3628 of the Act permits appeals to be taken to any court of appeals, judicial review of agency decisions in all of the first four postal rate proceedings conducted under the Postal Reorganization Act has been in the D.C. Circuit.

In view of this history and the fact that both the Postal Service and the PRC are located in Washington, D.C., there is a strong likelihood that venue on appeal in future postal rate cases will be in the same circuit.[11] Even if a petition for review is first filed with the court of appeals in another circuit, it is a virtual certainty that that court would either transfer the appeal to the D.C. Circuit or follow its teachings, reasoning that the remedy for any misinterpretation of §3622(b) lies with this Court. Hence, the chance of a future conflict of decisions between two courts of appeals is remote. Unless this Court grants *certiorari,* the ratemaking principles laid down by the court below will, in effect, have the same finality as a decision of this Court would have and will govern the future course of postal ratemaking.

II

The Court Below Has Read Into The Postal Reorganization Act A Ratemaking Methodology That Is Contrary To The Words Of The Act, To The Intent Of Congress And To The Expert Judgment Of The Agencies Vested With Ratemaking Responsibility.

On its face the decision of the court in *NAGCP III* is an affirmance of a decision of the PRC and the Governors in the fourth postal rate case, PRC Docket R77-1. In reality, however, the court itself is the principal architect of the decisions issued by the postal

[11] Section 3628 provides that 28 U.S.C. §2112 shall apply to such appeals.

agencies in this case, "responsive" to the "strictures of NAGCP I." See App. A11, 36, 59.

Under those strictures, the postal agencies have departed radically from the two-step methodology they applied in the first three postal rate cases. The prime example of change is the new "service related" cost concept, born of the postal agencies' court-mandated search for tenuous "inferences of causation." See PRC, Docket R77-1, Vol. 1, pp. 87-89, 121-24.

The decisions of the PRC and the Governors in the fourth postal rate case plainly state their disagreement with the court's interpretation of §3622(b). The PRC said:

> We would mislead the reader if we left the impression that we regard *NAGCP I* as unquestionably sound and our previous methods as incompatible with the Act. On the contrary, and with all due respect to the court, we believe that the *NAGCP I* ruling was not inevitably required by the statute and has caused us difficulties in its application. Whether or not it remains the law, however,[1] it is the law today and we are bound to follow it to the best of our ability. (PRC, Docket R77-1, Vol. 1, pp. 9, footnote omitted.)

The Governors of the Postal Service agreed. App. B6.

The PRC said that, responsive to the *NAGCP I* decision, it had "both extended attributions beyond the levels previously attained and added . . . reasonable assignments of the type called for by *NAGCP I.*" PRC, Docket R77-1, Vol. 1, pp. 9-10. This resulted in an increase in cost "attributions" from 60 to 65 percent of total postal costs and in the "reasonable assignment" of $1.763 billion of "service related" and contingency costs[12] that would otherwise have been judgmentally

[12] "Service related" costs of $1.256 billion plus a contingency allowance of $507 million. See PRC Opinion, Docket R77-1, Vol. 1, p. 156.

allocated on the basis of the noncost criteria of the Act under the ratemaking principles set forth by the PRC in its opinions in Dockets R74-1 and R76-1. In "extended attributions" the court usurped the agencies' ratemaking function by imposing a costing methodology different from the one chosen by the agencies. In "assignments" the same judicial interference inheres and, in addition, the court's interpretation is contrary to the plain language of the Act.

A. Deference Due to Agency Interpretation.

In its opinion in *NAGCP III*, the court below repeatedly characterized its decision as one of restraint and deference to the PRC's expert judgment. App. A21-22, 28, 41-46, 57, 59. But the deference went only to the details of the methodology developed by the agencies within the rigid constraints of *NAGCP I*.

Rather than an example of judicial "restraint," the decisions of the court are the type of judicial intervention in agency discretion which this Court condemned in *FPC v. Transcontinental Gas Pipe Line Corporation*, 423 U.S. 326, 333-34 (1976) and in *Vermont Yankee Nuclear Power Corporation v. National Resources Defense Council, Inc., et al.*, 435 U.S. 519 (1978). By its continuing supervision of postal ratemaking the court below is inexorably imposing on the Postal Service and the PRC the cost-based ratemaking methodology which "the judges of the Court of Appeals . . . would have reached had they been members of the decisionmaking unit of the agency." *Id.*, 435 U.S. 519, 558.

This Court has repeatedly held that an appellate court may not substitute its own interpretation of a regulatory statute for that of the agency charged with

its administration, if the agency's construction is reasonable. *Udall v. Tallman*, 380 U.S. 1 (1965) and cases cited therein at page 16. See also, *Train v. National Resources Defense Council, Inc., et al.*, 421 U.S. 60, 75, 87 (1975).

The court's substitution of its interpretation of §3622(b) for that of the agencies can be sustained only if it is true, as the court claims, that the Congress has so "expressly" and "plainly" mandated the maximization of cost-of-service principles that the agencies' different statutory interpretation (which gave significant effect to noncost factors) amounted to a "flouting" of the statutory command. See App. D 40-47 and App. A 19-21 But there is no such express and plain mandate. The court itself said that the statute "is susceptible to a variety of interpretations" (App. D29, fn. 54) and referred to "the formidable task of definitively interpreting subsection 3622(b)(3)." App. D29. The fact is the court's interpretation cannot be reconciled with the language of the statute or its legislative history.

B. The Language of the Act.

The court below concluded that the use of the single word "requirement" in §3622(b)(3) evidenced Congress' intent that costs, whether they are to be attributed or assigned, must be allocated, to the maximum extent possible, on cost-of-service principles. But, as Judge MacKinnon said in his concurring opinion in *NAGCP I*:

> The word "shall" at the forepart of section 3622 is just as mandatory as the word "requirement," in the same section, if not more so, since it applies to the entire section—but the Per Curiam opinion overemphasizes the latter and refuses to recognize

the former. (App. D77.)

By its overemphasis on (b)(3) as the only "requirement" among the nine statutory factors in §3622(b), the court of appeals has, in effect, rewritten that section. The court's interpretation reads into the statute the words "cost-of-service principles" and "accounting principles," which the Congress did not use, and robs the noncost factors, which the Congress did specify, of any real significance.

C. The Legislative History of the Act.

1. The Influence of the Kappel Commission Report.

The court's interpretation of §3622(b) is not consistent with the legislative history of the Postal Reorganization Act of 1970, as the court contends. In its review of the legislative history the court below ignored the substantial background of events which prompted the executive branch to propose postal reorganization and the legislative materials reflecting these events which provided the factual and conceptual foundation for the 1970 Act. The report of the Kappel Commission is not mentioned by the court, even though that report greatly influenced the development of postal reform legislation.

The Kappel Commission declared that the then existing postal rate structure was "irrational" and strongly condemned the Cost Ascertainment System upon which it was based. That System used the type of cost accounting formulae and cost-of-service principles which the court below said the 1970 Act requires the Postal Service and the PRC to use today. The Kappel Commission said:

> The Post Office uses a Cost Ascertainment System, authorized by a 43-year-old statute, for determining the revenues, volume and cost of each class

> of mail. For determining costs, it uses the "fully-allocated" method through which every postal expense is charged to some class of mail or special service. *A large segment of postal costs, however, does not result from handling a particular class of mail but is the cost of maintaining the postal system itself. The allocation of such institutional costs to specific postal products, despite painstaking attempts to achieve fairness, is not only arbitrary but uninformative.* (The Report of the President's Commission on Postal Organization, p. 30 (1968); emphasis supplied.)

As a substitute, the Kappel Commission recommended the development of a functional cost system based on long run variable costs, *i.e.*, costs that vary with mail volume. It recommended further that postal rates for each mail class cover those costs "which it alone causes . . . whether these costs are capital costs or operating costs" plus an appropriate share of all other costs based on market demand considerations. *Id.* at 131. The Kappel Commission made a distinction between postal costs that are (1) "the actual cost of providing the specific service" and (2) "the share of institutional postal costs which each class is asked to bear." *Id.* at 130. The Commission's Report said that there was no undue discrimination in postal rates so long as each class paid " as a minimum, the long-run variable costs ascribable to it—the full added *costs demonstrably related* to that class." *Id.* at 131; emphasis supplied.

The Kappel Commission's cost and ratemaking recommendations were contained in the original administration postal reform bill. H.R. 11750, 91st Cong., 1st Sess. (1969). The ratemaking section provided that each class bear "at least those *costs demonstrably*

related to the class of service in question."[13] The Postal Service was required to "take into account the financial impact upon affected users of the various classes of the mail" in allocating other postal costs to achieve the breakeven mandate that revenues from mail users plus appropriations equal total postal costs.[14]

In explaining the ratemaking provisions of H.R. 11750 to the Senate Post Office and Civil Service Committee, the Postmaster General said:

> Except for free and reduced-rate mail, no postage rate would be set at a level below demonstrably related costs for the particular class or subclass involved. This provides a floor upon which a rate can be built to recover not only the demonstrably related costs but also an appropriate amount of the remaining costs, not traceable to any one service. The proposed legislation does not establish a rigid formula specifying how such allocation of nontraceable costs shall be made, although undue discrimination and preferences are expressly prohibited and all rates are required to be fair and reasonable. The determination as to how nontraceable costs shall be allocated can be made in the light of current economic conditions, and will depend upon the type, value, and quality of service rendered, and such market factors as the ability of users to pay and elasticity of demand.
>
> The Kappel Commission made an important contribution to the rationality of the ratemaking process when it pointed out the shortcomings of the present cost ascertainment system, under which all costs, direct and indirect, are arbitrarily prorated among the several classes of mail without taking into account the differences in service and the differences in market conditions affecting the

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[13]H.R. 11750, 91st Cong., 1st Sess. (1969), §1201(c); emphasis supplied.

[14]*Id.* §1201(d).

various classes.

> Only a costing system which shows what it actually costs to carry each class of mail can be helpful in determining the minimum price the various classes should pay. A supplemental accounting system needed to determine the costs demonstrably related to each class of mail is now being designed, and this system should provide reliable data from which a more rational rate structure can be developed.[15]

The new functional cost system, developed by the Department in response to the Kappel Commission recommendations, was called the Revenue and Cost Analysis. It presented two types of costs, demonstrably related costs and institutional costs. Each amounted to approximately 50 percent of total postal costs. Demonstrably related costs were defined as:

> Those costs, direct or indirect, which by empirical or deductive analysis can be demonstrated (1) to vary in response to changes in volume of a particular class, subclass, or category of service, or (2) even though fixed, to be the consequence of providing one specific class, subclass, or category of service.[16]

Institutional costs were defined as:

> Costs which are not directly responsive to changes in postal volume and which are not the consequence of providing a specific class, subclass, or category of service. Institutional costs are the total costs of the postal service, less demonstrably

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[15] Postal Modernization Hearings Before the Senate Committee on Postal Office and Civil Service, 91st Cong., 1st Sess. (1969), at page 506.

[16] Postal Rates and Revenue and Cost Analysis, Hearings Before the House Subcommittee on Postal Rates, 91st Cong., 2nd Sess. (1970), at page 75.

related costs.[17]

2. The House Bill (H.R. 17070) Versus the Senate Bill (S. 3842).

The House of Representatives eventually passed H.R. 17070, 91st Cong., 2nd Sess. (1970). That bill contained verbatim the ratemaking language of §1201(c) of H.R. 11750, the original administration bill, which established "demonstrably related costs" as the rate floor for non-preferred mail classes.[18] As had H.R. 11750, the House-passed bill also provided for continuation of certain statutory rates for preferred mail classes[19] and for Congressional veto of the rates developed under the new regulatory type proceedings.[20]

The Senate, on the other hand, considered S. 3842, 91st Cong., 2nd Sess. (1970). That bill established an independent rate commission to set postal rates;[21] there was no provision for Congressional veto. S. 3842 contained no minimum rate floor; it only required the rate commission to consider all costs "properly assignable" to each class of mail and several noncost factors.[22] Those noncost factors were not contained in H.R. 17070, but they were similar to the considerations the Postmaster General said should be used in allocating institutional costs. S. 3842 continued no statutory rate preferences, but provided for a phasing-in period for certain rate categories to adjust to whatever higher rates were recommended by the independent rate commission.[23]

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[17] *Id.*

[18] H.R. 17070, §1201(c).

[19] *Id.*, §1202.

[20] *Id.*, §1254.

[21] S. 3842, §3702.

[22] *Id.*, §3704(g).

[23] *Id.*, §3704(i).

The Senate Committee report stated that the Committee had rejected a fully allocated cost approach using arbitrary cost accounting formulae and had refused to endorse any "particular cost accounting system."[24]

Going into conference, then, the major differences over postal ratemaking were:

(1) Congressional veto (continued congressional involvement in ratemaking–H.R. 17070) versus independent rate commission (getting "politics out of the Post Office," *i.e.*,eliminating any congressional role in ratemaking–S. 3842);

(2) Minimum rate floor for each nonpreferred class (demonstrably related costs–H.R. 17070) versus no rate floor for any class, whether preferred or not (rates to be set by an independent commission based on its consideration of cost and newly added noncost factors–S. 3842); and

(3) Continuation by statute of preferred rate categories (H.R. 17070) versus no statutory rate preferences, but a phasing-in period for a transition to higher postal rates (S. 3842).

The *NAGCP I* court believed that the Senate bill was the genesis for the Act's "requirement" language on cost allocations and that the Senate prevailed over the House in the compromises that were made on this critical issue. App. D38-39. The contrary is true. The "demonstrably related costs" recovery section of the House bill was the genesis for the "requirement" language.

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[24] S.Rep. 91-912, 91st Cong., 2nd Sess., at page 17.

3. The Meaning of the Conference Committee Compromises.

The Senate prevailed in "getting politics out of the Post Office," but that meant establishing an independent rate commission (39 U.S.C. §3601) and eliminating any Congressional ratemaking involvement via a veto power. It did *not* mean that subjective judgments based on noncost factors were to be proscribed or relegated to little importance in postal ratemaking. The Senate was the branch of Congress that specified the noncost factors.

A compromise was reached on the preferred rate categories by adopting the phasing-in period contained in S. 3842 (39 U.S.C. §3626) and by establishing an "attributable cost" rate ceiling on preferred rates (39 U.S.C. §3626(a)(1)) identical to the minimum rate floor for nonpreferred classes (39 U.S.C. §3622(b)(3)). Continuation of statutorily prescribed rates was eliminated.

The House prevailed in its minimum rate floor, although this floor was described as the "direct and indirect cost attributable to" a class of mail, rather than as "demonstrably related costs." 39 U.S.C. §3622(b)(3). The House also persuaded the Senate conferees that the statutory rate ceiling for the preferred classes should be based on these same attributable costs. The noncost criteria in S. 3842 were included as factors the Commission "shall" consider. 39 U.S.C. §3622(b).

Since it was the House version that contained the minimum rate floor and the statutory rate preferences for preferred classes which prevailed in the conference, the most reliable indication of Congressional intent is the Statement of the Managers on the part of the House. The House Managers said:

> The conference substitute adopts the Senate provision with an amendment which incorporates the standard that each class of mail or type of mail service should bear the direct and indirect postal costs attributable to that class or type plus that portion of other costs of the postal service reasonably assignable to such class or type.
>
> The provision in the conference substitute with respect to costs attributable to a class of mail or type of service establishes a floor for each class of mail equal to costs which consist of those costs, both direct and indirect, that vary over the short term in response to changes in volume of a particular class or, even though fixed rather than variable, are the consequence of providing the specific service involved. In addition, the conference substitute provides for a judgmental assignment of some part of the remaining costs.[25]

With respect to statutory rate preferences the House Managers said:

> The conference substitute adopts the Senate provisions [for a phasing-in period] with an amendment which provides that revenues from rates on nonprofit preferred rate mailings shall not, after 10 years, exceed postal costs for such mail excluding any portion of overhead or institutional costs.[26]

In the House debate on the Conference Report, Congressmen Derwinski and Udall, both key House conferees, equated "attributable costs" with "demonstrably related costs."[27]

Thus the legislative history contradicts the *NAGCP I* court's conclusion that Congress intended that postal

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[25] Statement of Managers on the part of the House, H.R. Rep. No. 91-1363, 91st Cong., 2nd Sess. (1970), at page 87.

[26] *Id.* at page 86.

[27] See 116 Cong. Rec. 27602, 27606 (1970).

costs be both attributed and assigned to the maximum extent possible using cost-of-service principles. Congress intended that rates for nonpreferred classes cover at least attributable costs; all other costs were to be assigned on the basis of the noncost criteria. Rates for the preferred classes were limited to attributable costs.

This reading of the Act is buttressed by subsequent legislative activity. Prompted by its concern that the PRC had given insufficient consideration to noncost criteria in setting postal rates, Congress, prior to the *NAGCP I* decision, added a new noncost criterion, "the educational, cultural, scientific, and informational value to the recipient of mail matter."[28] Also, in the House, an amendment was offered by Representative Schroeder to require allocation of costs utilizing the type of cost-of-service principles the *NAGCP I* court subsequently read into the Act. It was defeated.[29]

Nowhere, then, does the legislative history support the version of Congressional intent expounded by the *NAGCP I* court and reaffirmed in *NAGCP III.*

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[28]Public Law 94-421, 94th Cong., 2d Sess., September 24, 1976, §10, 90 Stat. 1303, 1311. Also see Rep. Ford's statement in the floor debates on the Conference Report. 122 Cong. Rec. 29747-48 (1976).

[29]See 121 Cong. Rec. 30777-84 (1975).

CONCLUSION

For the reasons stated above, a writ of *certiorari* should issue to review the judgment and opinions of the Court of Appeals for the District of Columbia Circuit.

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